Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

REPLY COMMENTS OF HEARST-ARGYLE TELEVISION, INC.

Hearst-Argyle Television, Inc. ("Hearst-Argyle"), by its attorneys, hereby replies to comments submitted in response to the Notice of Proposed Rulemaking ("*Notice*"), FCC 07-169, released October 1, 2007, in the above-captioned proceeding.

I.
Tying

The American Cable Association ("ACA") contends that Hearst-Argyle unlawfully "ties" retransmission consent for broadcast stations with certain affiliated cable/satellite network programming.[1] The assertion is not true, as the many members of ACA that have negotiated retransmission consent agreements with Hearst-Argyle surely know.

Hearst-Argyle has in the past designated, and may in the future designate, Lifetime Entertainment Services ("LES") as its agent for negotiating some, but not all, retransmission consent agreements for Hearst-Argyle stations.[2] As an agent, LES has been authorized to offer in its carriage negotiations with multi-channel video providers ("MVPDs") a package consisting of Lifetime cable networks and one or more Hearst-Argyle broadcast stations. LES, however, as

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[1] *See* Comments of American Cable Association at 7-8 (asserting that Hearst-Argyle ties "desired" ABC, NBC, and CBS affiliated stations with Lifetime Movie Network and Lifetime Real Women).

[2] The Hearst Corporation, the parent company of Hearst-Argyle, owns one-half of LES.

has Hearst-Argyle, offered all MVPDs the option to unbundle the package and to allow MVPDs to enter into retransmission consent negotiations only for the Hearst-Argyle stations. Neither LES nor Hearst-Argyle offered the combined program service package as a "take it or leave it" proposal.[3] By definition, the Hearst-Argyle/LES negotiating practice does not constitute an unlawful "tying" arrangement. The consideration proposed by Hearst-Argyle for retransmission consent of its stations unbundled from LES programming is fair and reasonable under any standard—it is not coercive.[4] Indeed, certain MVPDs, small and large alike, have elected to negotiate retransmission consent for Hearst-Argyle's stations without the Lifetime programming.[5] That, alone, should be dispositive of the question.

Hearst-Argyle is, and has *always* been, willing to negotiate for retransmission consent either on a station group, group subset, or individual station basis. Hearst-Argyle has agreements with MVPDs, small and large alike, that provide for retransmission consent each way,[6] which confirms that Hearst-Argyle does not tie retransmission consent of one of its stations with

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[3] *See* Declaration of Steven A. Hobbs ("Hobbs Declaration") at ¶ 4.

[4] The U.S. Supreme Court has determined that the kind of "market power" that may give rise to impermissible tying is such power as "enables him to force customers to purchase a second, unwanted product in order to obtain the tying product." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17-18 (1984); *see also Illinois Tool Works v. Independent Ink, Inc.*, 547 U.S. 28, 34-36, 42-43 (2006) (discussing favorably the Court's reliance on showing of market power in antitrust cases and abrogating the presumption that a patent creates market power). Indeed, federal courts require as an "essential" aspect of an illegal tying claim a showing that "the seller *coerced* a buyer to purchase the tied product." *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003) (emphasis in original); *accord Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 684-85 (2d Cir. 1982); *Bob Maxfield, Inc. v. Am. Motors Corp.*, 637 F.2d 1033, 1037-38 (5th Cir. 1981); *Ungar v. Dunkin' Donuts of Am., Inc.*, 531 F.2d 1211, 1224 (3d Cir. 1976). Because Hearst-Argyle, and other broadcasters, lack the necessary "market power," there can be no coercion.

[5] *See* Hobbs Declaration at ¶ 5.

[6] *See* Hobbs Declaration at ¶ 6.

retransmission consent of its other stations.[7]

Finally, even with respect to retransmission of the analog and digital signals by Hearst-Argyle's stations, the Company is *always* willing to consider the system characteristics and technical limitations of every MVPD that asks it to do so. Thus, dependent on those system characteristics and technical limitations, some retransmission consent agreements for Hearst-Argyle's stations provide for analog carriage only; others provide for digital carriage only; still others provide for analog and primary digital channel carriage; and yet others provide for analog and full 19.4 megabit digital signal channel carriage.[8]

Apparently, some of ACA's own members have rejected ACA's assertions and have withdrawn from ACA as a result of ACA's comments in this proceeding. Atlantic Broadband, Bresnan Communications, and Midcontinent Communications, three of ACA's most important members, have all withdrawn from the association in the wake of the comments ACA filed in this proceeding.[9] ACA, apparently, has a credibility issue with some of its most prominent members.

Neither ACA nor any other commenter has provided any factual evidence to support its inaccurate assertion that Hearst-Argyle has engaged in "tying" or any other inappropriate

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[7] *Cf. See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001) (finding offer of broadcaster to negotiate on either group basis or individual station basis did not constitute tying).

[8] *See* Hobbs Declaration at ¶ 7.

[9] *See* Linda Moss, *Midcontinent Becomes Third Op to Ankle ACA; Joins Atlantic Broadband, Bresnan in Defecting Over Program Issue*, MULTICHANNEL NEWS (Jan. 18, 2008), *available at* <http://www.multichannel.com/article/CA6524043.html.>.

negotiating tactic.[10] Moreover, as the Commission is aware, thousands of retransmission consent agreements have been negotiated since 1993, and of that number, only a dozen or so of good faith negotiation complaints have ever been filed with the Commission. Not a single broadcast station has ever been found by the Commission to have violated the Commission's good faith negotiation requirements or to have otherwise abused the retransmission consent process. In all but three instances, the parties either reached a private settlement or the Commission dismissed or found moot the retransmission consent complaint. *See EchoStar Satellite Corp. v. Clear Channel Communications*, Public Notice, Report No. 3742 (July 24, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Chris-Craft Broadcasting*, Public Notice, Report No. 3743 (July 28, 2000) (complaint dismissed upon request of parties); *EchoStar Satellite Corp. v. Landmark Communications*, DA 00-2102 (Sept. 15, 2000) (complaint dismissed upon request of parties); *Paxson Communications Corp. v. DirecTV*, DA 02-102 (Jan. 14, 2002) (issue moot); *Monroe, Georgia, Water, Light, and Gas Comm'n v. Morris Network, Inc.*, DA 04-2297 (July 27, 2004) (issue dismissed by Media Bureau); *Horry Telephone Coop. v. GE Media, Inc.*, DA 05-136 (Jan. 26, 2005) (complaint dismissed upon request of parties); *CoxCom, Inc. v. Nexstar Broadcasting, Inc.*, DA 05-2996 (Nov. 21, 2005) (complaint dismissed upon request of parties); *Metrocast Cablevision of New Hampshire, LLC v. Viacom,*

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[10] Even if a broadcast station unconditionally tied its retransmission consent to another program service, that alone, absent a showing that the broadcaster wielded "market power," would, of course, not be sufficient to sustain a finding of anti-competitive conduct. *See, e.g., Illinois Tool Works*, 547 U.S. at 46 (holding in patent context that "in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product."); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988) (stating elements of unlawful tying arrangement). Given, literally, the hundreds of television program services available to every MVPD and the level of robust competition in today's video marketplace, it would be impossible to conclude that any television station holds market power with respect to retransmission consent negotiations with any MVPD.

Inc., DA 06-140 (Jan. 25, 2006) (complaint dismissed upon request of parties); *Cebridge Acquisition, LLC v. Sinclair Broadcast Group, Inc.*, DA 06-1624 (Aug. 14, 2006) (complaint dismissed upon request of parties).

In the three adjudicated cases, the Commission not only found that the broadcaster in each case *had not* violated the regulatory scheme or the good faith negotiation requirement, but, rather, the Commission ruled that the complainant MVPD, in one case, *had* abused the FCC's processes and that the MVPD in another case had failed to negotiate in good faith. *See EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001) (finding EchoStar had abused the Commission's process); *Jorge L. Bauermeister*, DA 07-1264, (Mar. 13, 2007) (finding Choice Cable T.V. had failed to negotiate in "good faith"); *Mediacom Communications Corp. v. Sinclair Broadcast Group*, DA 07-3 (Jan. 4, 2007) (finding that the broadcaster *had* negotiated in "good faith").

By the same token, no MVPD, to our knowledge, has ever successfully litigated an antitrust claim against a broadcast station on the basis that the station unlawfully "tied" its retransmission consent or engaged in any other anti-competitive practice in connection with a retransmission consent negotiation.

The marketplace reality is that the long-anticipated introduction of video competition from satellite providers, telephone companies, and the Internet has now made it possible for broadcast stations to negotiate aggressively, but in good faith, for consideration from ACA's members in exchange for retransmission consent, i.e., for an exchange of value for the privilege of retransmitting and reselling for profit the signals of local television stations. The traditional "free ride" ACA members have enjoyed may well be in transition, not as a result of inappropriate negotiation tactics of Hearst-Argyle or any other broadcast company, but, rather, as a result of

competitive changes in the video marketplace. These changes, of course, impose economic challenges not only on ACA's members, but to broadcast stations as well.[11]

II.
Price Discrimination

ACA argues that its members pay more for broadcast retransmission rights than other MVPDs. Even if that were the case (and ACA cites no facts to support its argument), any differential in price is a marketplace function. ACA would apparently have the Commission set the permissible range of prices local stations may charge MPVDs for retransmission consent. It is doubtful, of course, ACA would, by the same token, support a requirement that the Commission set the price its members may charge for the delivery of a package of video services to their subscribers. ACA advocates an asymmetrical, conspicuously self-serving regulatory pricing regime—one the Commission is without statutory authority to implement.

Not only does the Commission lack the statutory authority to set retransmission consent prices, the Commission recognized in its recent *Mediacom* decision that it is appropriate and lawful for a broadcast station to request a retransmission consent fee from MVPDs at a price

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[11] In its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 (2006), the Commission wrote:

> We find that almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber to the home, or video over the Internet. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services, consumers are now able to maintain more control over what, when, and how they receive information. Further, MVPDs of all stripes are offering nonvideo services in tandem with their traditional video services.

Id., ¶ 5. *See also id.*, ¶¶ 27-69 (status of cable market) and ¶¶ 92-120 (status of broadcast market).

proportionate to the price paid by the MVPD for other video programming of comparable ratings.

ACA can hardly complain of the price it may have to pay for popular local television signals given the prices its members pay for good, but significantly less popular, cable/satellite programming. Audience ratings are measures of the level of audience acceptance and, in turn, the commercial value, of video programming. The Commission said it is

> reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming. Therefore, seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations.

Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc., DA 07-3 (Jan. 4, 2007), at ¶ 18.

Table 1 below reflects the audience acceptance and resulting market value of, and the price generally paid by cable operators (including ACA's members) for, cable/satellite network programming. Table 2 reflects the audience acceptance of the programming offered by Hearst-Argyle stations.

Table 1 shows the monthly program retransmission or license fee per subscriber that MVPDs paid in 2006 on average for ten of the most popular and widely-distributed cable/satellite networks, together with full-day ratings information. The average monthly license fee for these ten networks was approximately 91 cents ($0.907). The average full-day rating for these networks was 0.696. In other words, MVPDs routinely agree to pay, on average and as a result of arm's length, marketplace negotiations, 1.3 cents per subscriber per month for each 1/100 of a ratings point for non-broadcast programming.

Table 1

License Fees and Ratings for Ten Widely Distributed Satellite-Delivered Cable Networks

Programming Channel	2006 License Fee Per Subscriber Per Month	Full Day Household Rating*
ESPN	$2.91[†]	0.65
Fox Sports	$1.67	Unmeasurable
TNT	$0.89	0.91
Disney	$0.79	1.12
Fox News	$0.75	0.62
USA	$0.47	0.87
CNN	$0.44	0.39
Nickelodeon	$0.41	1.28
TBS	$0.39	0.65
FX	$0.35	0.47

* Ratings data cover the period September 25, 2006, through September 30, 2007.

[†] The license fee for ESPN for 2007 has been reported to be $3.26 per subscriber per month. *See* P. Grant and A. Thompson, *NFL Network Gets Blocked As Cable Takes Tough Stance*, WALL ST. J. (Aug. 20, 2007), A1.

Source for 2006 fees: Coalition for Retransmission Consent Reform (Advance/Newhouse Communications, Crown Media, Insight Communications, Oxygen Media, Cequel Communications, and Weather Channel Companies), *Ex parte* submission to FCC in MB Docket No. 06-189 (filed Feb. 15, 2007).

Source for ratings: Bruce M. Owen, *Wholesale Packaging of Video Programming*, Appendix 3, 51-61 (ratings data acquired from Nielsen Media Research), submitted in conjunction with the separate Comments of Viacom, Inc.; Fox Entertainment Group, Inc. and Fox Television Holdings, Inc.; and NBC Universal, Inc. and NBC Telemundo License Co. in MB Docket No. 07-198 (filed Jan. 4, 2008).

Table 2 shows the full-day ratings for ten of Hearst-Argyle's television stations in local markets of various sizes throughout the country. The average full-day rating for these ten television stations is 15.525. In other words, a typical Hearst-Argyle television station is more than *22.3 times (i.e., more than 2000%)* more popular with viewers than the ten most popular cable/satellite program services.

Table 2

Ratings for Ten Selected Hearst-Argyle Stations

HTV Station	DMA	DMA Rank	Full Day Household Rating*
WCVB	Boston (Manchester)	7	10.25
KCRA	Sacramento-Stockton-Modesto	20	11.50
WBAL	Baltimore	24	13.50
WISN	Milwaukee	34	12.25
WGAL	Harrisburg-Lancaster-Lebanon-York	41	20.00
KCCI	Des Moines-Ames	71	22.75
KETV	Omaha	75	15.75
WPTZ	Burlington-Plattsburgh	92	16.50
KHBS	Ft. Smith-Fayetteville-Springdale-Rogers	102	14.50
KSBW	Monterey-Salinas	124	18.25

* Ratings data cover the period July 2005 to May 2006.

Source for ratings: Comments of National Association of Broadcasters, Appendix K, Duopoly Analysis Report (ratings data acquired from Nielsen Media Research), in MB Docket No. 06-121 (filed Oct. 23, 2006).

Applying the license fee per ratings point that MVPDs have negotiated at arm's length and have agreed to pay for the most popular cable/satellite program services suggests a marketplace value of the signal of Hearst-Argyle stations of $20.18 per subscriber per month. Hearst-Argyle has, of course, never proposed to any ACA member or any other MVPD a retransmission consent fee of $20.00 per subscriber per month. But even if it did, the

Commission could hardly conclude, on any basis of fairness or equity, that a negotiating request for such a fee was not based on marketplace considerations or was in any way inappropriate or unlawful.

It borders on the absurd for ACA, National Telecommunications Cooperative Association, DISH Network, or any other MVPD to suggest that Hearst-Argyle's negotiating request for a retransmission consent fee representing a small fraction of the indisputable marketplace value of its signals is unreasonable, unlawful, or in any way violates the Commission's good faith negotiations rules.

Conclusion

Hearst-Argyle does not engage in unlawful tying, and the Commission should reject the proposal of ACA and others to intervene in this highly competitive marketplace.

Respectfully submitted,

HEARST-ARGYLE TELEVISION, INC.

/s/
Wade H. Hargrove

/s/
David Kushner

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Its Attorneys

February 12, 2008

Declaration of Steven A. Hobbs

I, Steven A. Hobbs, hereby declare, under penalty of perjury, as follows:

1. I am greater than eighteen years of age and am competent to make this Declaration.

2. I am the Executive Vice President and Chief Legal and Development Officer of Hearst-Argyle Television, Inc. ("Hearst-Argyle").

3. Since January 2004, I have managed Hearst-Argyle's retransmission consent negotiations and have overseen Hearst-Argyle's agency relationship with Lifetime Entertainment Services ("LES").

4. In 2004, Hearst-Argyle authorized LES, as an agent, to offer in its carriage negotiations with multi-channel video providers ("MVPDs") a package consisting of Lifetime cable networks and one or more Hearst-Argyle broadcast stations. LES, however, as did Hearst-Argyle, offered all MVPDs the option to unbundle the package. MVPDs were always free to enter into retransmission consent negotiations only for the Hearst-Argyle stations. Neither LES nor Hearst-Argyle offered the combined program service package as a "take it or leave it" proposal.

5. Certain MVPDs, small and large alike, have elected to negotiate retransmission consent for Hearst-Argyle's stations without the Lifetime programming.

6. Hearst-Argyle is, and has always been, willing to negotiate for retransmission consent either on a station group, group subset, or individual station basis. Hearst-Argyle has agreements with MVPDs, small and large alike, that provide for retransmission consent each way.

7. Hearst-Argyle considers the system characteristics and technical limitations of every MVPD that asks us to do so. Thus, dependent on those system characteristics and technical limitations, some retransmission consent agreements for Hearst-Argyle's stations provide for analog carriage only; others provide for digital carriage only; still others provide for analog and primary digital channel carriage; and yet others provide for analog and full 19.4 megabit digital signal channel carriage.

8. I have reviewed the accompanying Reply Comments, and they are true and accurate to the best of my knowledge, information, and belief.

I declare, under penalty of perjury, that the foregoing Declaration is true and accurate to the best of my knowledge, information, and belief.

February 11, 2008
Date

Steven A. Hobbs
Executive Vice President and
Chief Legal and Development Officer
Hearst-Argyle Television, Inc.